IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.487 OF 1990

Baban Bhau Tambe)
Resident of Bhorav,)
Taluka Mahad,)
District Raigad.) ...Appellant

Versus

1. The State of Maharashtra)

2. Dharma Dhondu More,)
Residing at Mohot,)
Taluka Mahad,)
District Raigad.) ...Respondents

Mrs Teja Katdare for the Appellant.

Shri S.R.Shinde, A.P.P for the State.

Shri D.G.Bagwe for the Respondent No.2.

CORAM : A. S. OKA, J.

DATE : DECEMBER 05/06, 2006.

JUDGMENT:

1. I have heard the submissions of the learned Advocate appearing for the Appellant (original accused No.1), the learned A.P.P for the Respondent-State and the learned counsel appearing for the second Respondent who is the original complainant (the father of the deceased). By the impugned Judgment and Order dated 26th July, 1990 passed by the learned Additional

Sessions Judge, Raigad at Alibag, the Appellant has been convicted for offences punishable under section 498-A and section 306 of the Indian Penal Code. For the offence under section 498-A, the Appellant has been sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.5,000/-. In default, the Appellant has been directed to suffer rigorous imprisonment for nine months. For the offence under section 306 of the Penal Code, the Appellant has been sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.5,000/-. In default, the Appellant has been directed to suffer rigorous imprisonment for eighteen months. On realisation of the fine amount, the learned Trial Judge directed that compensation of Rs.7,000/- shall be paid to the second Respondent. The sentences have been ordered to run concurrently.

2. Briefly stated the case of the prosecution is that the deceased Jijabai was lawfully married to the Appellant on 16th March, 1981 according to custom and convention of Nav Baudha Community. The deceased Jijabai was the third issue out of eight issues of her father P.W.2 Dharma. Initially the deceased Jijabai

cohabited with the Appellant at village Bhorav and she was subjected to harassment and ill-treatment. According to the prosecution case the deceased Jijabai had to take shelter in the house of her father at village Mohot, Taluka Mahad, District Raigad. At the intervention of the accused alongwith 10 to 15 persons, a meeting was held in which the accused agreed to treat Jijabai properly. In view of this agreement, the P.W.2 Dharma sent Jijabai for cohabitation with the Appellant. According to the prosecution case, in May 1984, P.W.2 Dharma visited the matrimonial house of his daughter and witnessed the assault and filthy abuses suffered by the deceased at the hands of the Appellant as Jijabai criticized her mother-in-law. The Appellant was employed at Excel Factory at Roha, District Raigad. According to prosecution case, in July 1984 the Appellant started residing with Jijabai and his two children in a one room tenement in village Varasgaon which was very close to his place of employment. According to the prosecution case in March 1985, when marriages of two sisters of deceased Jijabai were solemnised, only the Appellant attended marriages and he did not allow Jijabai to attend marriage ceremony. According to the case of the prosecution in May 1985,

the P.W.2 Dharma visited the residential tenement of the Appellant at Varasgaon and he found that deceased Jijabai was suffering from severe anaemia as a result of action of the Appellant of preventing the deceased from consuming food. According to the prosecution case the Appellant used to assault the deceased.

3. After the Ganapati festival of the year 1987, the P.W.2 Dharma alongwith his unmarried daughter Sushila (P.W.3) visited Varasgaon. They were in the house of the Appellant for few hours. According to the prosecution case, Jijabai and Sushila cooked the food and went to a canal for washing the clothes. At that time Jijabai disclosed to her sister Sushila that the Appellant used to taunt her on account of her excess food consumption during the meals. Jijabai also disclosed to Sushila that the Appellant had beaten her when she asked the Appellant explanation for his absence throughout the night during the Ganpatai festival. According to the prosecution case deceased also disclosed to Sushila that during her third pregnancy she suffered vomiting of blood and still she was made to do the work of cooking food and medical treatment was not provided to her. The allegation is

that on 19th September, 1987 Jijabai committed immolation by means of kerosene in front of her residential premises. This incident happened at 10.00 p.m. One of the neighbours Shri Pramod Bait lodged occurrence report with Kolad Police Out Post. A.S.I. Shri R.B. More recorded the report and rushed to Varasgaon. The police brought the said Jijabai to Sanjay Gandhi Trust Hospital and at about 12.35 p.m the attending medical officer (P.W.5) provided her treatment. The deceased Jijabai disclosed to P.W.5 that there used to be everyday fights between the Appellant and herself and in the said wrangling she used to suffer beating everyday at the hands of the Appellant. According to the prosecution case, on 19th September, 1987, the Appellant assaulted the deceased and thereafter proceeded to join night duty. After the Appellant left for his employment, the deceased committed suicide.

4. P.W.6 A.S.I. More reduced the narration of the deceased into writing (Exhibit 33) which is allegedly the dying declaration of the deceased Jijabai. Thumb mark of deceased Jijabai was affixed on the said dying declaration. It is stated that deceased died in the

midnight due to burn injuries. Accidental death report under section 174 of the Code of Criminal Procedure, 1973 was recorded by him. After P.W.7 Gaikwad recorded complaint at the instance of Dharma (P.W.No.2), offence under sections 498-A and 304-B of the Indian Penal Code was registered.

5. Before submissions were made on merits, the learned Advocate for the Appellant invited my attention to affidavit of the second Respondent Shri Dharma Dhondu More which was tendered across the Bar by Shri Bagwe, the learned Advocate appearing for the second Respondent. In the said affidavit, he stated that the Appellant has properly looked after his three children born to deceased Jijabai. He has stated that the Appellant has remarried and his second wife has properly looked after the children of the deceased and the Appellant has taken proper care to educate the said children. It is stated that the Appellant has performed the marriage of his elder daughter Nita and entire expenditure has been borne by the Appellant. The Appellant has provided proper facilities for education of two other children of the deceased. He has stated that he lodged the complaint against the

Appellant when condition of his mind was not proper. He has stated that now he feels that the Appellant should not be punished. He has recorded that the Appellant has remarried and his second wife has delivered two children. The learned Advocate for the second Respondent has also tendered affidavits of Hemant, the son of the deceased and of Nita, the married daughter of the deceased. By the said affidavits they also stated that the Appellant should not be punished. Apart from the submissions on merit, the learned Advocate for the Appellant tried to submit that in view of what is stated in the affidavits, power under section 482 of the Code of Criminal Procedure, 1973 for quashing the case can be exercised by this court even after conviction. The learned Advocate for the Appellant submitted that the Appellant has a very excellent case on merits and she was prepared to argue on merits.

6. Though a decision of the Division Bench of this court holds that there is a power vesting in this court under section 482 of the said Code to quash criminal proceedings which has resulted in conviction, it is obvious that said power has to be exercised provided

the case is fit to exercise the said power. Power under section 482 of the said Code has to be exercised very sparingly and in exceptional cases. In the present case, allegation of the prosecution against the Appellant is of commission of offence under section 306 of the Indian Penal Code. The deceased is gone and dead and therefore, only on the basis of alleged affidavits of the second Respondent and the son and daughter of the deceased, the power under section 482 of the said Code cannot be exercised in view of grave nature of allegations against the Appellant and in view of the very nature of offence under section 306 of the Indian Penal Code. Therefore, I am of the view that power under section 482 of the said Code cannot be exercised in the case. In view of this position, I have proceeded to hear the submissions on the merits of the Appeal.

7. I have heard detailed submissions of the learned Advocate appearing for the Appellant. Before adverting to the submissions made by the learned Advocate for the Appellant, it will be necessary to refer to the evidence led by the prosecution. The prosecution has examined seven witnesses. P.W.1 Shri

Suryakant Mayaji Patil is a formal witness. He was working as a Revenue Circle Inspector at the relevant time. He has drawn a sketch of the place of the incident. The said sketch (Exhibit 26) is proved in his evidence. In the said sketch he has shown the room No.2 occupied by the Appellant by red colour. In the cross-examination he admitted that there is another building comprising of four tenements to the south of the building in question. He stated that there is a lane having width of two to three feet in between the two buildings. In the cross-examination he stated that he noticed that rest of the rooms in the building except the room No.2 of the Appellant were locked. He has noted on the sketch (Exhibit 26) that room No.4 in the same building is occupied by one Pandurang Parshuram Shinde.

8. P.W.2 Dharma Dhondu More is the father of deceased. He deposed that out of his six daughters, five are married and deceased Jijabai was his third daughter. He stated that the marriage was solemnised between Jijabai and the Appellant on 16th March, 1981 in his house at village Mohat, Taluka Mahad, District Raigad. He stated that after marriage, Jijabai

cohabited with the Appellant at village Bhorav for a period of about two years. He stated that due to some domestic complications, he brought Jijabai to his home. Jijabai stayed with him for a period of two months. He stated that accused No.2 (elder brother of the Appellant), the mother-in-law of Jijabai and sister-in-law of Jijabai came to his house at Mohat. He stated that there was a meeting held in presence of local persons. In the said meeting the accused and Jijabai agreed to reside peacefully and with that understanding the Appellant took Jijabai to his house.

9. He stated that in May 1984 the deceased brother of the Appellant came to his house and took him to the matrimonial home of Jijabai. He stated that at that time he found Jijabai to be too weak as she was subjected to starvation by the accused persons. He stated that the Appellant assaulted her and hurled filthy abuses at her in his presence as Jijabai criticised the conduct of her mother-in-law. He stated that two months thereafter the Appellant took Jijabai to Varasgaon and started residing in the said village separately from his parents. In March 1985, the said witness performed marriages of his two other daughters.

He stated that the Appellant did not allow Jijabai to attend the said marriages and he himself attended the marriage ceremony. He stated that in May 1985, he alongwith his wife visited Varasgaon and met his daughter. He found that Jijabai was suffering from severe anaemia. When he questioned Jijabai, she informed him that the Appellant was not providing food and clothing to her and he was beating her. He stated that he provided a petty amount to his daughter and promised to bring one saree after returning home. He stated that prior to Ganesh festival of 1987, he visited the matrimonial home of Jijabai alongwith his unmarried daughter Sushila. At that time, he gave a saree to Jijabai. At that time he found that condition of Jijabia was severely anaemic. He stated that while Sushila accompanied the deceased to a canal for washing the clothes, Jijabai disclosed her sufferings to her sister Sushila. He stated that he alongwith Sushila came back on the same day. He stated that 7 to 8 days thereafter at 4.00 p.m one police constable contacted him in his place of employment and informed him that Jijabai has expired due to burn injuries after she was admitted to Cottage Hospital at Roha. He stated that he alongwith his wife, his son and two local persons

reached Roha at about 5.00 p.m and visited Sanjay Gandhi Hospital at Roha where dead body of Jijabai was kept. He stated that on 20th September, 1987 the police recorded his complaint. He proved the complaint in evidence. P.W.2 was extensively cross-examined by the Advocate appearing for the Appellant. First part of the cross-examination was as regards the date of marriage. P.W.2 has stated in examination-in-chief that the date of marriage was 16th March, 1981. Various questions were asked in the cross-examination as a result of which P.W.2 admitted that the date of marriage may not be 16th March, 1981. However, this controversy may not be addressed to any further as the learned Trial Judge after considering the evidence of P.W.2 has himself recorded a finding that the marriage between the Appellant and deceased Jijabai must have been solemnised in the year 1979. Considering the said finding, it is obvious that the death has not occurred within a period of seven years from the date of marriage.

10. P.W.2 was cross-examined at length on several other aspects. In the cross-examination he admitted that during the period when Jijabai was living in room

No.2 in Shinde Chawl in Varasgaon, there were three tenements in western row and three tenements in the eastern row of the said chawl. He admitted that there was no disagreement on the count of any demand either at the time of marriage or even subsequently thereafter. He admitted that there is a panch committee of the community to which he belongs for resolving the disputes. He admitted that he did not take the issue of harassment of his daughter before the panch committee. He admitted that there were families in the adjoining tenements of room No.2 in Shinde Chawl. He admitted that because of good pay of the Appellant everything was available in the tenement of the Appellant in Shinde Chawl including the facilities of food and clothes to deceased Jijabai. He admitted that after the marriage Jijabai has suffered epiliptic attack. He, however, denied the suggestion that she used to experience loss of senses for few hours after suffering the attack of epilopsy. He admitted that Jijabai had to stay at his house for two months as there was a purely domestic problem existing in the family of the Applicant. He stated that father of the Applicant had expired and after the demise of father, there was a dispute between the Appellant and his

brothers. He stated that as an elderly person he was called to attend a meeting for resolving the said domestic problem and he participated in the meeting and ultimately amicable settlement was arrived at. Only after the said settlement he permitted his daughter to resume cohabitation with the Appellant. He admitted that though he has referred to a meeting held at village Mohat in examination-in-chief, there is no reference to the said meeting in the F.I.R lodged by him. He admitted that in F.I.R he did not refer to dearth of clothes faced by the said Jijabai. He admitted that when the Appellant attended the marriage of his two other daughters, the Appellant gave presents. In the cross-examination, he further admitted that he visited Varasgaon 5 to 6 days prior to death of Jijabai. He stated that accused Nos.2 and 4 were not residing with Jijabai for 3 to 4 months prior to her death.

11. P.W.3 Sushila Dharma More is the younger sister of deceased Jijabai. She stated that after immersion of Ganesha in the year 1987, she visited Varasgaon alongwith her father. He stated that she visited Varasgaon as her deceased sister had invited her. She

stated that after taking meals she alongwith Jijabai went towards a canal for washing clothes. At that time Jijabai told her that the Appellant used to taunt her with reference to excess food quantity enjoyed by her. She stated that the deceased informed her that when deceased asked the appellant as to why he had spent entire night outside after attending Ganesh Puja, the Appellant had assaulted her. She stated that the deceased informed her that during her third pregnancy, she vomited blood and the Appellant did not provide medical treatment to her but forced her to cook food. In the cross-examination she stated that when she visited Varasgaon, deceased was wearing a torn saree. She stated that her sister complained that the Appellant used to take side of accused No.3 by stating that she should not serve food to accused No.3 and accused No.3 should be given liberty to enjoy food as per her desire. She admitted that her statement was recorded on 21st October, 1987 by the police and she did not refer to the allegation that the Appellant used to taunt deceased as regards excess food allegedly consumed by her. She also admitted that she did not tell police about blood alleged blood vomiting by Jijabai during her third pregnancy. She admitted that

Jijabai was taller and was having heavy frame than the Appellant.

12. P.W.4 Dattatraya Bapuji Shinde claimed to reside in the vicinity of the room of the Appellant at Varasgaon. He stated that in September 1986, he retired as A.S.I. He stated that the building of Balasaheb Shinde in which the Appellant was residing is located on the eastern side of his building at a distance of about 200 to 250 feet. According to him, Balasaheb Shinde is his brother. At about 10.00 p.m on 19th September, 1987 he heard screaming voice of a lady. After hearing the voice he rushed to the building and called two or three persons residing in the said building. When he came in front of room No.2, he noticed that a lady residing in that room was lying in the front side of the room in burning condition. He instructed his companions to extinguish the fire by throwing water. In the light of a torch he could notice one kerosene tin and one match box lying there. He further stated that he asked the injured lady and she told that that she has voluntarily committed self-immolation. He instructed his companions to report the matter to the police station and take the

lady to the hospital. He identified the said lady to be the wife of the Appellant.

13. In the cross-examination he stated that the distance between his house and the tenements of the Appellant is about 50 to 60 paces. He admitted that the said distance enables him to hear conversation in the tenement of the Appellant while in his house. He stated that he did not notice any untoward incident in the room of the Appellant and there was a peaceful cohabitation between the Appellant and his wife without any dispute or quarrel. He admitted that Shri More and Shri Shinde were immediate neighbours of the Appellant and three tenements in the side were also occupied by three tenants. He pointed out that four other tenements in the adjoining building on the southern side were occupied by four persons. He stated that out of the neighbours of the Appellants the police recorded statement of Shri Kharat and Shri Ramchandra More. He admitted that after the initial dialogue, the lady did not have any dialogue with him. He stated that he had seen deceased number of times. He stated that the deceased was having good height and heavy frame. The deceased used to attend his house for enjoying TV

programme. He stated that he always found the deceased to be in good mood and she never complained against the Appellant to him. He stated that he never found the deceased in anaemic condition till her death and she used to be properly dressed with good clothes.

14. Evidence of P.W.5 Dr. Nishidh Natwar Dhruw is very important as according to the prosecution he recorded dying declaration of the deceased. P.W.5 stated that he has done post graduation in General Surgery. He was medical officer incharge of Sanjay Gandhi Trust Hospital at Roha at the relevant time. He stated on 19th September, 1987 though the police had not referred but the relatives brought deceased in burnt condition in the Trust Hospital at about 11.30 p.m. He stated that he provided emergent treatment to her. He produced the case papers in the court. He stated that the condition of the patient was very poor and even blood pressure was not recordable. He pointed out that there was lot of secretion from her throat and she was gasping. He asked history to the patient. He stated that the patient disclosed that she had three children, one male and two female. The patient disclosed to him that there were constant fights

between husband and wife and she used to receive beating daily from her husband. She stated that there was a fight and beating on 19th September, 1987 after which the Appellant left for work. She stated that she sprinkled kerosene on her own body and lighted a match stick. He deposed that after disclosing the aforesaid history, the patient became unconscious and expired at 12.00 in the midnight. He stated that he recorded the statement in writing and signed the same. He stated that the hospital clerk had called the police. Accordingly, P.S.I. came to the hospital and recorded the statement of the deceased in his presence. He stated that on dying declaration which was recorded at 11.45 a.m, the patient affixed her thumb mark and it was attested by the P.S.I. He stated that the dying declaration bears his endorsement. In the cross-examination he admitted that his conversation with the patient started at about 11.40 p.m. He admitted that the lady was badly burnt almost to the extent of 100%. He admitted that blood pressure below 60 is treated as non-recordable blood pressure. He denied the suggestion that with 100% burns the patient goes in comma before he dies. He stated that in case of 100% burns if the trachea and larynx are not damaged

the patient may talk till before death. He stated that during his conversation with the patient no relative was allowed to enter the room. He denied that he has obliged the local police by maintaining false case papers and by giving the false advise.

15. P.W.6 Shri Raya Bhambu More was A.S.I attached to Roha Police Station at the relevant time. He stated that he recorded the statement of the deceased while conversation between the deceased and medical officer was going on. The dying declaration recorded by him which was allegedly signed by the medical officer is at Exhibit 33. He stated that he recorded the statement at 11.45 p.m. In the cross-examination, he admitted that according to his memory the patient must have expired between 11.50 to 11.55 p.m. He denied the suggestion that patient was gasping when he recorded the statement. He denied the suggestion that the patient was not in a position to speak.

16. P.W.7 Balkrishna B. Gaikwad was attached to Roha Police Station at the relevant time. He is the Investigating Officer who investigated the crime. In the cross-examination he stated that the Appellant was

attending his night duty when the deceased committed suicide. He admitted that he had recorded the statements of neighbouring persons to ascertain the element of cruelty. It was revealed that the said persons did not notice the harassment suffered by the deceased at the hands of the Appellant and in fact the said persons found that relationship between the Appellant and the deceased was cordial.

17. There is documentary evidence on record in the form of case papers of the deceased maintained by the hospital, report of the chemical analyser, cause of death certificate and post mortem notes.

18. As pointed out earlier, there is already a finding that the death of the deceased has occurred after expiry of period of seven years from the date of marriage. Therefore, section 113-A of the Evidence Act will have no application.

19. It will be necessary to refer to section 498-A of the Penal Code. The explanation defines cruelty which is covered by the said section. Clause (a) of the explanation provides that cruelty means any willful

conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health, (whether mental or physical) of the woman. Clause (b) of the explanation provides that cruelty means harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account on failure by her or any person related to her to meet the demand. Section 306 deals with abetment to commit suicide which will have to be naturally read with section 107 of the Penal Code. In the case of **Sushil Kumar Sharma Vs. Union of India and Others (2005(6) Supreme Court Cases Page 281)** the Apex Court had an occasion to deal with basic difference between the section 306 and section 498-A. The Apex Court held that the basic difference between the two sections is that of intention. Under section 498-A cruelty committed by the husband or his relatives drag the woman to commit a suicide. While under section 306, the suicide is abated and intended. The Apex Court, therefore, held that in a given case even cruelty committed by husband which drives the wife to commit suicide is established it is not necessary that offence

under section 306 of the Indian Penal Code is established because under section 306 suicide is abated and intended. Going back to the evidence of the father of the deceased (P.W.2) it must be closely scrutinised to ascertain as to what are the allegations of the cruelty against the Appellant. P.W.2 in the examination-in-chief stated that initially Jijabai cohabited with the Appellant at village Bhorav for a period of two years and therefore due to domestic complications she was required to come back to him and stayed with him for two months. In examination-in-chief he stated that thereafter the accused and his relatives came to his village as Jijabai had to come back to him as she was subjected to cruelty by all the accused persons. In examination-in-chief he stated that the Appellant and his daughter agreed to reside peacefully and on this understanding, the Appellant took Jijabai to his house. This part of the examination-in-chief may indicate that Jijabai had to come back to her father’s house due to cruelty at the hands of the Appellant and other family members of the Appellant. However, in the cross-examination P.W.2 admitted that deceased Jijabai had nothing to do with the domestic problem. The

problem essentially arose after the demise of the Appellant's father, as there was a dispute inter-se between the Appellant and his brothers. Infact, he admitted that as an elderly person he was called to resolve the dispute and the dispute was resolved. He stated that after the dispute was resolved, he allowed deceased Jijabai to resume cohabitation with the Applicant. In examination-in-chief he tried to suggest that meeting was held at this village which was attended by the Appellant and members of his family and 15 other persons. In cross-examination he had to admit that he has not referred to any such meetings held in Mohat in the complaint lodged by him.

20. The second allegation made by P.W.2 is that in May 1984 the Appellant's brother Ramesh had taken him to matrimonial home of Jijabai when he found Jijabai to be to weak due to starvation subjected by the accused persons. He stated that as Jijabai criticised the conduct of her mother-in-law, the Appellant assaulted her and gave filthy abuses to her. In the cross-examination he himself has falsified the said case regarding starvation. He stated that the Appellant was receiving good pay. Therefore, food,

clothes and other facilities were available in the abundance in the house of the Appellant. At this stage it must be noted that P.W.3 Sushila (younger sister of the deceased) has deposed that deceased disclosed to her that the Appellant used to taunt her on account of excess quantity of food enjoyed by her. P.W.3 admitted that her deceased sister was having heavier frame than the accused No.1. In examination-in-chief P.W.2 stated the Appellant took Jijabai to Varasgaon and started residing at Varasgaon separately from his parents. He admitted in cross-examination that in March 1985 when marriage of his two other daughters was solemnised, though the deceased did not attend the marriage, the Appellant attended the marriage and offered gifts. He stated that in May 1985 when he alongwith his wife visited Varasgaon, he found that Jijabai was suffering from severe anaemia and she disclosed that the Appellant did not provide her food and clothes and always assaulted her. As pointed out earlier, version of Sushila-P.W.3 is to the contrary. The last incident of cruelty alleged by P.W.2 is based on his visit alongwith P.W.3 Sushila 7 to 8 days prior to the incident. However, his version as to what was disclosed by deceased to the said Sushila is hearsay

and cannot be considered. So far as P.W.3 Sushila is concerned, her version is narrated in earlier part of the judgment. However, she candidly admitted that in her statement recorded by the police two days after the incident was she did not disclose that deceased had told her about taunting by the Appellant in respect of the excess food consumed by her. The second incident of cruelty narrated by Sushila was that during third pregnancy, Jijabai vomited blood and at that time the Appellant did not provide her medical help. P.W.3 admitted that she did not disclose any such incident of vomiting of blood to the police. It is obvious that this is not a case where prosecution has alleged or established any demand on the part of the Appellant or other accused persons. On the contrary, the categorical admission of the P.W.2 is that either before the marriage or thereafter there was no disagreement on account of any demand. He also admitted that the Appellant was receiving good pay as a result food, clothing and other facilities were available in abundance to Jijabai. Therefore, it is obvious that clause No.(b) in explanation to section 498-A will not be attracted.

21. Now the other issue to be examined is whether there was any wilful conduct on the part of the Appellant which was of such nature or was likely to drive his wife to commit suicide. On this aspect reference will have to be made to alleged dying declarations and the evidence of Investigating Officer. Before I refer to the said evidence, it will be absolutely necessary to refer to the evidence of P.W.4 Dattatraya who is retired A.S.I. He is the only witness who is examined by the prosecution who was present immediately after the deceased poured kerosene on her person and lighted match. He rushed to room of the Appellant and ensured that other persons accompanying him extinguished the fire. He stated that when he enquired with the deceased, the response of the deceased was that she had voluntarily committed self-immolation. His version is that thereafter the deceased did not speak further. More importantly the said witness was residing in a house which was situated at the distance of 50 to 60 paces from the house of the Appellant. He further stated that all along there was peaceful cohabitation between the Appellant and his wife without dispute or quarrel. He also deposed that the deceased was having a very heavy frame and good

height. He stated that deceased used to visit his house for watching TV programmes. He stated that he always found deceased to be in good mood and she never complained against the Appellant. He specifically stated that he never found the deceased to be in anaemic condition. It must be borne in mind that this is the evidence of prosecution witness who is not declared as hostile. He is an independent witness. The accused can certainly rely on evidence of such witness. On this aspect it will be necessary to refer to evidence of P.W.7 Balkrishna Gaikwad who was the Investigating Officer. He admitted in cross-examination that he recorded statements of neighbouring persons to ascertain element of cruelty. He candidly admitted that during his investigation, when he recorded the statements of the neighbours namely Hanumant Kharat, Pandurang and Ramchandra, the said neighbours stated that not only that they did not notice any harassment suffered by the deceased at the hands of the Appellant but found that the cohabitation of the deceased with the Appellant was very cordial. The prosecution has not chosen to examine the said three witnesses whose statements were admittedly recorded by the Investigating Officer and who

admittedly stated that they did not notice any harassment of the deceased at the hands of the Appellant. The prosecution has withheld the evidence of said three material witnesses who are independent witnesses and who were admittedly next door neighbours of the Appellant. Even according to the case of the P.W.2 in 1984 itself the deceased started residing in the said tenement of the Appellant at Varasgaon and she committed suicide on 19th September, 1987. Thus, the said neighbours as well as P.W.4 had occasion to observe the behaviour of the Appellant and the deceased. That is the reason why evidence of P.W.4 assumes importance for more than one reason. The first reason is that he is a retired A.S.I. The second reason is that he is a prosecution witness and the third reason is that he appears to be an independent witness.

22. I have already pointed that the father of the deceased and his sister have made major improvements in their version. While dealing with the said evidence of the close relatives of the deceased, it will be necessary to reproduce paragraph No.48 of the decision of the Apex Court in the case of **Sharad Birchand Sarda**

Vs. State of Maharashtra [(1984) 4 Supreme Court Cases Page 116].

"48. Before discussing the evidence of the witnesses we might mention a few preliminary remarks against the background of which the oral statements are to be considered. All persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. **In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit**

> **of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it".**(Emphasis supplied)

The evidence of the said independent witness P.W.4 and the admissions given in the cross-examination by the Investigating Officer makes the case of the prosecution extremely doubtful as regards cruelty either mental or physical on the part of the Appellant.

23. That takes me to to the other limb of the prosecution case based on dying declaration. P.W.4 who was only prosecution witness who talked to the deceased immediately after the incident stated that the deceased disclosed that she had voluntarily put herself on fire and the deceased thereafter did not talk further. P.W.5 Dr.Dhruw was the medical officer in-charge of Sanjay Gandhi Hospital. According to his version the deceased was brought by her relatives. He stated that

police did not refer deceased to the said Hospital. According to the prosecution case, he recorded the dying declaration of the deceased. The original case papers of the hospital are at Exhibit 32. On the case paper it is recorded that at 11.35 p.m the patient was brought to the hospital. At that time condition of the patient was very poor. The pulse and blood pressure was not recordable. There were secretions through her mouth and she was gasping. P.W.5 has recorded thereafter on the case paper that he had asked the police to record the dying declaration. He has further recorded that it was a case of 100% burns. He has stated in his evidence that he could elicit history from the deceased to the effect that deceased has three children, one male and two female and there were constant fights between her and the Appellant. According to him the deceased stated that on 19th September, 1987 there was a fight and she was assaulted by her husband after which her husband left for work. The case paper further records that the deceased became unconscious and died at 12.00 in the midnight. In the cross-examination the witness admitted that her blood pressure must be below 60 and therefore, it was unrecordable. He stated that his conversation must

have started at 11.40 p.m. He stated that at that time no relative was present. His evidence will have to be appreciated in the light of evidence of P.W.6 Shri R.B.More who was working as A.S.I in Roha Police Station. He stated that while medical officer was taking history from the patient, he recorded statement of the deceased. He stated that he obtained her thumb mark at the bottom of the statement and also obtained endorsement from the medical officer. His version is that he recorded the statement at 11.45 p.m. In the said alleged dying declaration it is recorded that the deceased disclosed that she had only two children, one son and one daughter. This part is contrary to what is recorded by the medical officer. According to medical officer, the deceased disclosed that she had three issues. In the dying declaration at Exhibit 33, a statement of the deceased is recorded that her husband was always beating her and due to trouble she was tired and she came in open place and poured kerosene on her person. Surprisingly, in examination-in-chief P.W.6 stated that after recording the dying declaration, he personally lodged accidental death report with Roha Police Station. The said report is at Exhibit 35. In the document at Exhibit 35, there is no reference to

any dying declaration. In a report in writing submitted by the P.W.6 of the A.S.I. of Roha Police Station, he has disclosed the dying declaration. In the cross-examination the said witness stated that there is an inadvertent mistake in the report submitted by him to the civil surgeon at Raigad and he has wrongly mentioned time of the death of the deceased as 10.00 p.m. He stated that according to his memory patient must have expired at 11.50 to 11.55 p.m. Though the medical officer says that the deceased was gasping while taking the history, P.W.6 denied that the deceased was gasping.

24. According to the medical officer deceased was brought to the hospital at 11.35 p.m and at that time her pulse and blood pressure was not recordable and she was gasping. According to the medical officer after answering few questions the deceased became unconscious. The version of the P.W.6 is that he recorded dying declaration at 11.45 and the deceased expired between 11.50 to 11.55. The version recorded in the said dying declarations is that the deceased had two issues. The third possible dying declaration is by P.W.4 Dattatraya who stated that deceased disclosed

that she voluntarily committed self-immolation and did not disclose anything further. The perusal of the case papers and the version of P.W.5 and P.W.6 read with the version of P.W.4 creates a serious doubt as to whether at 11.40 or thereafter the deceased was in position to tell anything or to tell anything coherently. All this has to be appreciated in the light of independent evidence of P.W.4 who found the relationship between the husband and wife very cordial and who found that the deceased was always in a good mood. His version is that deceased was always properly dressed with good clothes. The finding of the learned Judge as regards commission of offence under section 306 is based only on the dying declaration at Exhibit 33.If the evidence of all the prosecution witnesses is considered, it is very difficult to arrive at a conclusion that ingredients of section 107 of the Penal Code are satisfied.

25. Perusal of the impugned Judgment shows that the learned Judge has not at all considered the evidence of P.W.4 who is an independent witness in proper prospective. The learned Judge has completely ignored the discrepancies in the two alleged dying declarations

and the condition of the health of the deceased as recorded in the case papers. If the dying declarations inspire confidence certainly the conviction can be based on dying declarations. As disclosed earlier there are more than sufficient reasons for discarding the so called dying declarations set up by the prosecution. Thus the prosecution has failed to establish any wilful conduct of the Appellant which was of such nature as was likely to drive the deceased to commit suicide. Thus the case is not covered either by clause (a) or clause (b) of the explanation to section 498-A of the said Code.

26. Thus, it is obvious that offences alleged against the Appellant are not at all established by the prosecution beyond reasonable doubt. Hence, Appeal must succeed.

27. Hence, I pass the following order:

(i) The conviction and sentence of the Appellant by Judgment and Order dated 26th July, 1990 in Sessions Case No.101 of 1988 is quashed and set aside and the Appellant is acquitted of the

offences alleged against him.

(ii) Bail bonds of the Appellant are cancelled.

(ii) The order regarding destruction of muddemal property is confirmed.

JUDGE